Petition

81-1521

No. ___

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THOMAS DAVIS, Petitioner,

-v.-

UNITED AIR LINES, INC., Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Does Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793, provide an epileptic individual who alleges that he has been discriminated against by his employer with a private right of action where:

(1) The statute was enacted for the especial benefit of handicapped individuals, but was not found by the court below to contain specific "right-creating" language;

(2) Congress enacted an attorney's fee provision governing Section 503 five years following passage of the original statute; and

(3) In the absence of a private right of action, petitioner and other handicapped individuals will be left remediless because of the inadequacy of the administrative mechanism as demonstrated in this case.*

*The caption of the case in this Court contains the names of all parties. Counsel of record for petitioner Thomas Davis were counsel for amicus curiae in the Court of Appeals but have been substituted as counsel for petitioner for all further proceedings.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Thomas Davis prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Second Circuit dated September 17, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is officially reported at 662 F.2d 120 (2d Cir. 1981) and is set forth at Appendix A herein. The unreported opinion of the District Court is set forth at Appendix B herein.

JURISDICTION

The order of the Court of Appeals for the Second Circuit was dated and entered September 17, 1981. Petitioner filed a timely motion for an extension of time for filing the petition for a writ of certiorari, and this Court extended Petitioner's deadline until February 14, 1981, by an order set

forth at Appendix C herein. This petition for a writ of certiorari is filed within the period permitted by that order. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISION

The federal statutory provision involved is Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793. The text of this provision is set forth as Appendix D herein.

STATEMENT OF THE CASE

Petitioner, Thomas Davis, was employed by United Air Lines, Inc. ("United")as a ramp serviceman on September 6, 1966. His basic duties consisted of loading and unloading aircraft. In 1969 Mr. Davis was diagnosed as having epilepsy, a fact which he made known to United at that time. From 1969 to September 15, 1974 he experienced several seizures of which United also had knowledge. Nevertheless, from 1969 to September 15, 1974 Mr. Davis performed all the duties of a ramp serviceman without restriction.

On September 15, 1974 United placed Mr. Davis on restricted duties and ultimately confined him to working in the bagroom because of his epilepsy. Subsequently Mr. Davis undertook a new course of medication and thereafter submitted a statement to United from his physician indicating that he was fully capable of performing all the duties of his job without restriction.

United did not restore Mr. Davis to his full duties. Instead, on June 6, 1977 it removed him from his position and involuntarily placed him on "extended illness status" solely because he is an "epileptic." Thereafter, on February 15, 1980 United officially terminated Mr. Davis from his employment solely because of his handicap and despite the fact that he had satisfactory performed all his duties throughout the eleven years of his employment. At no time did United offer Mr. Davis another suitable position.

Mr. Davis' labor union sought redress of the situation without success. On December 11, 1978 he filed a complaint with the United States Department of Labor alleging discrimination due to a handicap in violation of Section 503. On October 1, 1979 after ten months had passed and the Department had not resolved the problem in any manner, Mr. Davis instituted the present action. As of the date of this petition the Department of Labor has still not resolved the matter.

United moved to dismiss the complaint. Applying the criteria established in Cort v. Ash, 422 U.S. 66 (1975), and subsequent decisions of this Court, the District Court for the Eastern District of New York held that Section 503 created an implied private right of action. The District Court also rejected United's contention that Mr. Davis had failed to exhaust available administrative remedies.

Pursuant to 28 U.S.C. §1292(b), United appealed this decision and the Court of Appeals for the Second Circuit reversed, holding that Section 503 contains no private right of action. In a 2-1 decision authored by Judge James L. Oakes and joined by Judge Jon O. Newman, the majority first determined that although Section 503 was designed to benefit handicapped persons, it was not intended to create a federal right in favor of the plaintiff. The Court observed that the language of Section 503 is "duty-creating" rather than "right-creating," and from this it concluded that the plaintiff was not a member

of the class for whose especial benefit the statute was enacted. Next, the majority determined that the legislative history of Section 503 was ambiguious with respect to implication of a private right of action. According to the Court, the debates over the Rehabilitation Act of 1973 and the amendments enacted in 1974 provided little insight into congressional intent, and Congress' enactment of an attorney's fees provision for Section 503 in 1978 was inadvertant.

Third, the Court held that implication of a private right of action would be inconsistent with the administrative scheme established by the statute. Finally, the majority recognized that discrimination against the disabled is not traditionally relegated to state law, but it concluded that the other three Cort factors weighed against implying a right of action.

Judge Irving R. Kaufman dissented from this opinion. He suggested that the substance of the obligations created, rather than the use of specific language, should guide determination of for whose especial benefit Section 503 was enacted. Judge Kaufman then examined the legislative history of Section 503 and concluded that the enactment of the attorney's fees provision was substantial evidence of congressional understanding that Section 503 could be privately enforced. Finally, Judge Kaufman took exception with the majority's conclusion that the administrative mechanism

for enforcement of Section 503 was intended to be exclusive. He pointed out that the administrative scheme was neither detailed nor precise and that the Department of Labor had favored private enforcement to complement its own efforts. On the basis of these findings, he concluded that Section 503 did create an implied private right of action.

REASONS FOR GRANTING THE WRIT

A primary reason for granting a writ of certiorari in this case is that the Court of Appeals has grossly misapplied recent decisions of this Court concerning implication of private rights of action. By misconstruing Cort v. Ash, 422 U.S. 66 (1975), Cannon v. University of Chicago, 441 U.S. 677 (1979), and subsequent cases, the Court below deviated from the cardinal principle that congressional intent should be the central focus for determining whether an implied private right of action exists. Because this error fosters judicial encroachment upon the traditional

role of the legislative branch, this Court should exercise its supervisory powers by reviewing the decision below.

With one excention,* the Court of Appeals seriously distorted three of the Cort factors in applying them to this case. First, it determined that handicapped persons are not the especial

*There is no dispute that the fourth Cort factor weighs in favor of implying a private right of action since it is clear that discrimination against the disabled has not been a matter traditionally relegated to state law.

beneficiaries of Section 503 by focusing exclusively on whether the statutory language is "right-creating" or "duty-creating," a mode of analysis wholly unsupported by the decisions of this Court. Second, the Court of Appeals concluded that the legislative history of Section 503 does not support implication of a private right of action. But by dismissing as "inadvertant" Congress' enactment of an attorney's fees provision governing section 503, the court below ignored dispositive evidence of congressional intent to imply a private right of action, again in violation of this Court's principles of interpretation. Finally, the Second Circuit suggested that implication of a private right of action would be inconsistent with the purpose of Section 503, which it determined to be no more than the establishment of an administrative enforcement procedure. However,

because the statutory enforcement mechanism has proved to be wholly inadequate, leaving the petitioner and other handicapped persons without any effective administrative remedy, the Court of Appeals' conclusion regarding this factor is likewise without foundation.

The need for review is compounded by the substantial disagreement among lower courts regarding the issue presented. Although the Courts of Appeal that have addressed the issue have concluded that Section 503 creates no private right of action, two of these decisions were issued over vigorous dissents by distinguished judges. See Davis v. United Air Lines, Inc., at A-17, infra (Kaufman, J., dissenting); Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1085 (5th Cir.) (Goldberg, J., dissenting), cert. denied,449 U.S.889 (1980), and the district courts that have

considered this question have been sharply divided.*

Finally, even in the absence of manifest error by the Court of Appeals and disagreement among the lower courts, this would be an appropriate case for review by this Court because it presents an important question of federal law that has not been settled by this Court. The issue of whether Section 503 of the Rehabilitation Act may be privately enforced is an important one because of its

*District courts have held that a private right of action exists under section 503 in Davis v. Modine Mfg. Co., No. 79-1655 (D. Kan., November 10, 1981); Chaplin v. Consolidated Edison Co., 482 F.Supp. 1165 (S.D.N.Y. 1980); California Paralyzed Veterans Ass'n v. F.C.C., 496 F.Supp. 125 (C.D. Cal. 1980); Clarke v. FELRC Services, Inc., 489

Footnote continued.

close relation to the implication of private rights of action under other antidiscrimination statutes. Furthermore, this Court's ultimate decision will have a significant impact on the millions of handicapped persons whom the Act was designed to benefit. Here, final resolution of the issue is especially necessary since the demonstrated inadequacy of the administrative procedure leaves disabled persons remediless in the absence of private enforcement.

*Footnote continued
F.Supp. 165 (D. Alaska 1980); Hart v. County of Alameda, 485 F.Supp. 66 (N.D. Cal. 1979); Duran v. City of Tampa, 430 F.Supp. 75 (M.D. Fla. 1977); and Drennon v. Philadelphia Gen'l Hospital, 428 F.Supp. 809 (E.D. Pa. 1977). On the other hand, district courts have concluded that no private right of action exists in Simon v. St. Louis County, 497 F.Supp. 141 (E.D. Mo. 1980); Doss v. General Motors Corp., 478 F.Supp. 139 (C.D. Ill. 1979); Anderson v. Erie Lackawanna Ry. Co., 468 F.Supp. 934 (N.D. Ohio 1979); and Wood v. Diamond State Tel. Co., 440 F.Supp. 1003 (D. Del. 1977).

I. THE COURT OF APPEALS SEVERELY DISTORTED THE INTERPRETIVE PRINCIPLES OF THIS COURT WHEN IT IGNORED THE INTENT OF CONGRESS THAT HANDICAPPED INDIVIDUALS ARE THE INTENDED BENEFICIARIES OF SECTION 503

The first inquiry required by the framework established in Cort v. Ash, supra, is whether the plaintiff is a member of the class for whose "especial benefit the statute was enacted." 422 U.S. at 78. The Second Circuit conceded that Section 503 was "generally intended to benefit handicapped individuals," but it found that the statute could not satisfy the first Cort criterion because it contains only "duty-creating" language directing the inclusion of affirmative action clauses in federal contracts, rather than "right-creating" language establishing entitlements for handicapped persons. Therefore, the Second Circuit reasoned, Section 503 does not create a federal right in favor of the plaintiff.

The Second Circuit's reliance on Cannon v. University of Chicago, supra, as a basis for this rationale was wholly misplaced. Nowhere in that decision did this Court state that the first Cort factor could not be satisfied unless "right-creating" language could be located in the statute. Rather, it merely observed that such language has been "the most accurate indicator" of the implication of a private remedy.* 441 U.S. at 690 n.13. Furthermore, at the same time that it made that observation, this Court emphasized the fundamental importance of distinguishing between a statute which "expressly identifies

*Although the Cannon court listed as statutes containing the type of language most conductive to the inference of a private remedy provisions such as Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, et seq. ("No person... shall be...excluded...") and Section 5 of the Voting Rights Act, 42 U.S.C.§1973 ("No citizen shall be denied..."), its first example of a case where such implication had been appropriate--in fact, "irresistable"--was one in which the language of the statute focused entirely on a specifically benefited class and failed to mention explicitly any federal right or remedy whatsoever. In Texas and Pac.R.Co. v. Rigsby, 241 U.S. 33 (1916), the relevant statute read:

Footnote continued

the class Congress intended to benefit," and which would therefore satisfy the first Cort criterion, and one which was enacted merely "for the protection of the general public."

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*Footnote continued

"any employee of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk...." 27 Stat. 532. Paraphrasing the Rigsby decision, Cannon noted that "the statutory reference to 'any employee of such common carrier', in the 1893 legislation requiring railroads to equip their cars with secure 'grab irons or handholds' ...made 'irresistable' the Court's earliest 'inference of a private right of action', --in that case in favor of a railway employee who was injured when a grab iron gave way." 441 U.S. at 689.

Here the very language of Section 503 makes it clear that Congress intended to benefit handicapped individuals, the class of persons of which plaintiff Davis is a member. The statute specifically requires that covered contracts contain provisions requiring employers to "take affirmative action to employ and advance in employment qualified handicapped individuals. " 29 U.S.C. §793. Moreover, the provision of an enforcement mechanism which can be initiated by a handicapped person differentiates Section 503 from a mere "ban on discriminatory conduct or...prohibition against the disbursement of public funds to...institutions engaged in discriminatory practices" which might fail the first Cort test. See Cannon v. University of Chicago, 441 U.S. at 691-93.

By providing an enforcement aparatus that is triggered by a handicapped individual, Section 503 grants federal rights to a specific class of persons in a more explicit fashion

than does Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, et seq., which was found in Cannon to contain an implied private right of action.

By reducing its analysis in this case to a search for talismanic phrases, the court below failed to make a full review of Congress' intent here. The very suggestion that a statute may imply rather than express a private right of action indicates that a complete analysis of congressional purpose is required. This can only be accomplished by looking to the substance of the obligations created by the statute, taking into account the law's language, structure, and legislative history.* Combing the statute for magic words, as the court below did here, is inadequate.

*Virtually every court which has considered the question has concluded that Section 503 was enacted for the "especial benefit" of the handicapped as a class. See Chaplin v. Consolidated Edison Co., 482

Footnote continued

II. THE COURT OF APPEALS REJECTED AS "INADVERTANT" A STATUTORY PROVISION AND ACCOMPANYING LEGISLATIVE HISTORY THAT ARE DISPOSITIVE REGARDING CONGRESSIONAL INTENT TO IMPLY A PRIVATE RIGHT OF ACTION

When it dealt with the second factor of the Cort analysis--legislative intent to create or deny an implied private right of action--the court below inexplicably dismissed the most probative evidence available: Congress' enactment of an attorney's fees provision governing Section 503. In 1978, a mere five years after original passage of the Rehabilitation Act, Congress added a section which states in pertinent part:

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*Footnote continued

F.Supp. 1165 (S.D.N.Y. 1980); California Paralyzed Veterans Ass'n v. FCC, 496 F.Supp. 125 (C.D. Cal. 1980); Clarke v. FELBC Services, Inc., 489 F.Supp. 165 (D. Alaska 1980); Hart v. County of Alameda, 485 F.Supp. 66 (N.D. Cal. 1979); Duran v. City of Tampa, 430 F.Supp. 75 (M.D. Fla. 1977); Drennon v. Philadelphia Gen'l Hospital, 428 F.Supp. 809 (E.D. Pa. 1977). Even courts which have refused to recognize a private right of action have acknowledged that the statute satisfies the first Cort criterion. See Anderson v. Erie Lackawana Ry. Co., 468 F.Supp. 934, 936 (N.D. Ohio 1979); Wood v. Diamond State Tel. Co., 440 F.Supp. 1003, 1008 (D. Del. 1977).

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Sec. 505(b), 29 U.S.C. §794a(b).

The legislative history of this amendment is unequivocal. As originally introduced, the House bill set out each of the sections to which the attorney's fees provision would be applicable, including Section 503. See H.R.Rep.No. 95-1149, 95th Cong., 2d Sess. 41 (1978). The Senate omitted reference to individual sections of the Act and substituted a provision permitting attorney's fees under all sections of Title V. The Senate committee report enunciated the committee's belief that:

> the rights extended to handicapped individuals under Title V, that is, Federal government employment, physical accessibility in public buildings, employment under federal contracts, and nondiscrimination under federal grants--are and will remain in need of constant vigilance by handicapped individuals to assure compliance and the availability of attorney's fees should assist in vindicating private rights of action in the case of Section 502 and 503 cases, as well as those arising under Section 501 and 504.

Sen. Rep.No. 95-890, 95th Cong., 2d Sess. 19 (1978) (emphasis supplied).

The court below, however, dismissed Congress' application of attorney's fees to Section 503 as "inadvertant." It reasoned that the legislative branch could not, except by explicit amendment, create a private right of action that it had not intended five years before. But this rationale conflicts with

the mode of analysis utilized by this Court in Cannon. That case held that Title IX created an implied private right of action, based in part on subsequent legislative history concerning an attorney's fees provision. This Court stated:

> Although we cannot accord these remarks the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX....

441 U.S. at 686 n.7.

Here, where Congress amended the Rehabilitation Act only five years after its original enactment, great weight must be accorded to its understanding that the Act had created a private right of action. The court below did not do so.

The Court of Appeals' error is attributable in part to the dispositive weight that it gave to the absence of substantial congressional discussion of private enforcement at the time Section 503 was originally enacted. However,

in Cannon v. University of Chicago, 441 U.S. at 694, this Court observed that "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." Consequently, the dearth of contemporary congressional expressions of intent to create a private right of action cannot be given the determinative weight that it was accorded by the Court of Appeals in this case. "[T]he failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available." Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 18 (1979).

There are compelling reasons for the brevity of the initial legislative discussion of Section 503. By the time that it enacted the Rehabilitation Act in 1973, Congress had considered the propriety of utilizing federal funding to enforce civil rights twice in the previous decade: during the debate

over Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and eight years later when it passed Title IX of the Education Act Amendments of 1972. Therefore, it is hardly surprising that Congress did not pause to reconsider or explain its intentions when it adopted an analogous mode of attack by enacting Title V of the Rehabilitation Act.

Thus, the Court of Appeals' decision here deviates from the mandates of this Court and creates a conflict between Congress and the courts. This Court has recently made clear that the Cort analysis is designed ultimately to determine the intent of Congress. California v. Sierra Club, ___U.S.___; 101 S.Ct. 1775, 1778-79 (1981); Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979). It is not the function of the courts to improve upon the statutory scheme intended by the legislature. Touche Ross & Co. v. Redington, 442 U.S. at 578. Therefore, the absence of conclusive contemporary legislative history

is not a license for a court to ignore subsequent congressional pronouncements lest the balance of responsibility between Congress and the judiciary be upset. Recognizing this danger, the Supreme Court has consistently relied upon subsequent legislative history where contemporaneous congressional statements are absent or conflicting. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Federal Housing Administration v. Darlington, Inc., 358 U.S. 84 (1958); United States v. Stafoff, 260 U.S. 477 (1923). Indeed, this Court recently scrutinized the legislative history of a 1964 amendment in order to assess Congress' initial intent in enacting the basic statute in 1931. See Universities Research Ass'n v. Coutu, 450 U.S. 754, 777-80 (1981). By rejecting similar evidence as "inadvertant," the court below thwarted the will of Congress, making

review of this case imperative.

III. WITHOUT A PRIVATE RIGHT OF ACTION HANDICAPPED PERSONS ARE LEFT REMEDILESS, IN VIOLATION OF THE LEGISLATIVE PURPOSE OF SECTION 503

In analyzing the third Cort factor, the court below found that Congress' purpose in enacting Section 503 had not been to remedy discrimination against the handicapped but merely to provide an administrative mechanism for the processing of Section 503 claims by the Department of Labor. The Court then concluded that the existence of that administrative procedure automatically precluded implication of a private remedy. This rationale is erroneous both because the administrative remedy has proven wholly inadequate and because the same factors that led this Court to find that this factor was satisfied in Cannon are present here.

The facts of this case demonstrate the utter futility of pursuing the administrative process for redressing violations of Section 503. Plaintiff Davis filed a complaint with

the Department of Labor in December, 1978 after he had been placed on involuntary sick leave by his employer solely because he had been diagnosed as an epileptic. Although three and one-half years have elapsed since Davis filed his grievance, the Department has failed to resolve his complaint. Throughout this time he has received no wages and has been denied the opportunity to return to or advance in his employment. If he is denied the right to assert his claim in court, Davis is left without any effective remedy whatsoever.

Recognizing that cases like that of Mr. Davis are not unique, the Department of Labor has taken the position that, far from being inconsistent with its duties under the statute, the implication of a private right of action under Section 503 would in fact aid the Department's Office of Federal Contract Compliance Programs (OFCCP) in its enforcement efforts. In an affidavit submitted in Rogers v. Frito-Lay, supra, the Director of OFCCP urged the implication of a private right of action under Section 503, explaining that:

> OFCCP believes that a private right of action would be consistent with Congress' intent, and would greatly assist the Department of Labor's effort to enforce Section 503. Such assistance has become necessary because of the large backlog of Section 503 administrative complaints, which the Department of Labor, due to limited resources, will not be able to investigate and resolve expeditiously....
>
> The Department of Labor disagrees with the district court's views in Rogers v. Frito-Lay, Inc., 433 F.Supp. 200 (N.D. Tex. 1977); Anderson v. Erie Lackawanna Ry. Co., 468 F.Supp. 934 (N.D. Ohio [1979]), and Wood v. Diamond State Telephone Co., 440 F.Supp. 1003 (D. Del. 1977) that a private right of action would jeopardize informal efforts to resolve Section 503 complaints. The Department believes that the prospect of litigation would have a sobering effect on the parties concerned, and actually encourage informal conciliation.

611 F.2d at 1108 (Goldberg, J., dissenting) (Appendix).

Inasmuch as the Second Circuit apparently believed that the implication of a private right of action would somehow interfere with the administrative enforcement mechanism, it is ironic that it chose to dismiss a contrary statement by the agency with direct knowledge of the relevant facts. The Court of Appeals' analysis thus ignored the repeated admonitions of this Court that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. Miller v. Youakim, 440 U.S. 125, 144 (1979). See Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1969).

Even if this case did not illustrate so vividly the practical inadequacies of the administrative enforcement scheme, reference to the statutory purpose alone should have justified implication of a private right of action. In Cannon, this Court stated:

> a private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to implication under the statute.

441 U.S. at 703 (footnote omitted). Yet in attempting to apply this test to Section 503, the court below confused the statutory goal with one means established by Congress for accomplishment of that goal.

The purpose of the Rehabilitation Act was to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment." 29 U.S.C. §701. Section 503 in particular was enacted to eliminate discrimination against the handicapped by government contractors. By its very terms, it is an antidiscrimination measure, proscribing the exclusion and differential treatment of handicapped individuals by requiring that federal contractors "employ and advance in employment qualified handicapped individuals." 29 U.S.C. §793(a).

This broader definition of Section 503's purposes is consistent with this Court's analysis of the similar statutory scheme in Cannon. There, in identifying the "underlying purpose" of the legislation, this Court focused on Title IX's two basic objectives: Congress' desire to "avoid the use of federal resources to support discriminatory practices [and] ...to provide individual citizens effective protection against these practices." 441 U.S. at 704. In Cannon this Court clearly saw Title IX's administrative enforcement mechanism as a means to achieving these larger goals. It noted that

> The first purpose is generally served by the statutory procedure for the termination of federal financial support for institutions engaged in discriminatory practices. That remedy is, however, severe and often may not provide an appropriate means of accomplishing the second purpose....

441 U.S. at 704-5 (footnote omitted).

As under Title IX, the administrative enforcement mechanism established by Section 503 may further the goal of terminating federal involvement with discriminatory employers, but it is inadequate for furthering the purpose of protecting individuals against discriminatory practices. Like Title IX, Section 503's compliance procedure places upon the enforcing agency (here the Department of Labor) or upon the aggrieved individual the burden of proving that a contractor's practices are so pervasively discriminatory that a total termination of federal involvement is warranted. In the absence of such a finding, the Department must make the untenable choice between the severe and inappropriate step

of terminating contracts with a company that has committed a minor violation and leaving that violation unpunished. See Cannon v. University of Chicago, 441 U.S. at 704-05. Compare 20 U.S.C. §1682 and 45 C.F.R. §80.10(f) (adopted by reference for Title IX. 45 C.F.R. §86.71) with 41 C.F.R. §60-741.28. Moreover, here, as in Cannon, the administrative scheme

forecloses the complainant--the party with the greatest interest in the outcome--from participation in the enforcement procedure once he has registered his grievance. See Cannon v. University of Chicago, 441 U.S. at 706 n.41. Compare 41 C.F.R. §§60-741.26 through 60-741.29 (Section 503) with 45 C.F.R. §§80.6-80.11 and 81 (Title IX) (adopted by reference). Thus, the administrative procedure created by Section 503 contains the same inherent deficiencies that this Court identified in Cannon as the basis for finding implication of a private right of action consistent with legislative intent. Again, however, the court below failed to follow the mode of analysis established by this Court for dealing with this factor.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Second Circuit in this case.

Dated: February 12, 1982

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Appendix

APPENDIX A: Opinion of the United States Court of Appeals for the Second Circuit

SEP 25 1981

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1346—September Term, 1980

(Argued May 12, 1981 Decided September 17, 1981)

Docket No. 81-7093

THOMAS DAVIS,

Plaintiff-Appellee,

—v.—

UNITED AIR LINES, INC.,

Defendant-Appellant.

Before:

KAUFMAN, OAKES, and NEWMAN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, holding that a private right of action for alleged discrimination in employment by a governmental contractor may be implied in favor of a handi-

capped employee under Section 503 of the Vocational Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793. Reversed.

MICHAEL A. KATZ, New York, N.Y., *for Defendant-Appellant.*

NORMAN SPIEGEL, New York, N.Y., *for Plaintiff-Appellee.*

OAKES, *Circuit Judge:*

This case involves the issue whether section 503 of the Vocational Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793,[1] gives an employee a private right of action against an employer contracting with the federal government for alleged discrimination in employment on the

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1 Section 503 provides in relevant part:

(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals . . . .

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

29 U.S.C. § 793.

basis of physical handicap. The question has been answered contrarily by a number of district courts,[2] with differing views among the district judges in the Second Circuit,[3] but the only courts of appeal passing on the question, the Fifth,[4] Sixth,[5] and Seventh,[6] Circuits, have held that there is no such private judicial remedy. We agree with the extended analysis of this question by Judge Alvin Rubin for the panel majority in the Fifth Circuit in *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980), and our examination of the cases decided in the Supreme Court and in our own court since *Rogers* was handed down reenforces the conclusion in *Rogers* that no private right of action may be inferred from section 503. Accordingly, we reverse the judgment of the United States District Court for the Eastern District of New York, Jack

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2 *Compare California Paralyzed Veterans Ass'n*, 496 F. Supp. 125, 131 (C.D. Cal. 1980) (finding that a private right of action exists under section 503); *Clarke v. FELEC Servs., Inc.*, 489 F. Supp. 165, 169 (D. Alaska 1980) (same); *Hart v. County of Alameda*, 485 F. Supp. 66, 76 (N.D. Cal. 1979) (same); *Duran v. City of Tampa*, 430 F. Supp. 75, 78 (M.D. Fla. 1977) (same); *Drennon v. Philadelphia Gen'l Hosp.*, 428 F. Supp. 809, 816 (E.D. Pa. 1977) (same), *with Simon v. St. Louis County*, 497 F. Supp. 141, 149 (E.D. Mo. 1980) (finding that no private right of action exists under section 503); *Doss v. General Motors Corp.*, 478 F. Supp. 139, 141 (C.D. Ill. 1979) (same); *Anderson v. Erie Lackawanna Rx Co.*, 468 F. Supp. 934, 940 (N.D. Ohio 1979) (same); *Wood v. Diamond State Tel. Co.*, 440 F. Supp. 1003, 1010 (D. Del. 1977) (same).

3 *Compare Langman v. Western Elec. Co.*, 488 F. Supp. 680, 685 (S.D.N.Y. 1980) (Knapp, J., finding that no private right of action exists under section 503), *with Chaplin v. Consolidated Edison Co.*, 482 F. Supp. 1165, 1173 (S.D.N.Y. 1980) (Lasker, J., finding that a private right of action exists under section 503).

4 *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1085 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 246 (1980).

5 *Hoopes v. Equifax, Inc.*, 611 F.2d 134, 135 (6th Cir. 1979).

6 *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1244 (7th Cir. 1980).

B. Weinstein, Judge, which found the reasoning of courts upholding a private right of action "persuasive" in light of the factors identified by the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975). We do not reach the question whether Thomas Davis, the appellee, had failed to exhaust his administrative remedies in this case, or the question whether this case was within the primary jurisdiction of the Department of Labor.

The facts was alleged in the complaint may be very briefly stated. Thomas Davis had worked for United Airlines, Inc. ("United") since 1966 as a ramp serviceman, servicing aircraft and loading and unloading cargo. In 1969 he was diagnosed as having epilepsy and from time to time until mid-September 1974, he experienced seizures that did not interfere with his satisfactory performance of duties as a ramp serviceman. After he experienced a seizure in mid-September 1974, he was placed on restricted duties, and he was ultimately confined to working in the bag room. In June 1977, he was placed on "extended illness status" because of his epilepsy; he was officially discharged on February 15, 1980.

In December 1978 Davis filed a complaint with the Department of Labor as provided by section 503(b), note 1 *supra*, charging that United had discriminated against him on the basis of his physical handicap. The Department of Labor has not acted on his complaint. In October 1979, he filed a private suit against United in the Eastern District of New York claiming that United had violated his rights under section 503. Judge Weinstein denied United's motion for judgment on the pleadings, and certified his order for appeal in accordance with 28 U.S.C. § 1292(b). It is assumed for purposes of this appeal that Davis is physically "handicapped" within the meaning of the Act, *see* 29 U.S.C. § 706(6), that United

holds government contracts subject to the requirements of section 503, and that Davis was discharged because of his handicap.

The law may be briefly stated as follows. Under section 503(a), any contract in excess of $2,500 entered into by the federal government must "contain a provision requiring that . . . [the contractor] shall take affirmative action to employ and advance in employment qualified handicapped individuals. . . ." 29 U.S.C. § 793(a). Section 503(b) provides that if any handicapped individual "believes any contractor has failed or refuse[d] to comply with the provisions of his [federal] contract," that "such individual may file a complaint with the Department of Labor" which shall "promptly investigate" and "take such action . . . as the facts and circumstances warrant. . . ."

Because section 503 creates no explicit private judicial remedy against federal contractors charged with employment discrimination against the handicapped, the federal courts have had to determine whether a private right of action may be inferred. The starting points for our analysis must be the four factors set out in *Cort v. Ash*, whether we view these factors as "a part of our law," *California v. Sierra Club*, 49 U.S.L.W. 4441, 4445 (U.S. Apr. 28, 1981) (Stevens, J., concurring), or as "merely guides in the central task of ascertaining legislative intent," *id.* at 4445 (Rehnquist, J., concurring in the judgment). *See Texas Industries v. Radcliff Materials, Inc.*, 49 U.S.L.W. 4537, 4540 (U.S. May 26, 1981). Analysis of the *Cort* factors is the "preferred approach" for determining whether an implied private right of action exists. *See Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 26 (1979) (White, J., dissenting); *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

Under *Cort* the initial consideration is whether the plaintiff is a member of a class for "whose *especial* benefit the statute was enacted." *Cort v. Ash*, 422 U.S. at 78, 80-82. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 569-70 (1979). Although section 503 was generally intended to benefit handicapped persons, that alone does not establish that Congress intended to "create a federal right in favor of the plaintiff." *Cort v. Ash*, 442 U.S. at 78. *See Rogers v. Frito-Lay, Inc.*, 611 F.2d at 1079.

The Supreme Court has suggested that a private right of action may be more readily implied when the language of a statute is "right-creating" rather than merely "duty-creating." *See Cannon v. University of Chicago*, 441 U.S. at 690 n.13. Statutory language has been found right-creating when it focuses explicitly on the benefited class. *See, e.g., id.* at 682 n.3 ("no person . . . shall, on the basis of sex, be excluded . . . ," 20 U.S.C. § 1681); *Allen v. State Board of Elections*, 393 U.S. 544, 554-55 (1969) ("no person shall be denied the right to vote . . . ," 42 U.S.C. § 1973c).

Section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794, which is not at issue in this case, invokes just such right-creating language: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Accordingly, a number of courts have held that section 504 creates a private cause of action for handicapped persons.[7]

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[7] *See, e.g., United Handicapped Federation v. Andre*, 558 F.2d 413, 415 (8th Cir. 1977); *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1287 (7th Cir. 1977); *Davis v. Bucher*, 451 F. Supp. 791, 797 (E.D. Pa. 1978); *Doe v.*

By contrast, section 503 contains only duty-creating language, directing federal departments and agencies to provide in all federal contracts that contractors are obligated to take affirmative steps to employ and advance handicapped persons. Nowhere does section 503 confer an express right upon the handicapped, nor impose a direct duty on federal contractors. *See Rogers v. Frito-Lay, Inc.*, 611 F.2d at 1079-80. As Judge Rubin noted in *Rogers*, the use of duty-creating rather than right-creating phrases, though "not conclusive," makes "inference of a private cause of action more difficult." *Id.* at 1080. Indeed, the Supreme Court has stated that language such as that contained in section 503 militates against inferring a private right of action:

> There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.

Cannon v. University of Chicago, 441 U.S. at 690-93.

The second inquiry under *Cort* is whether there is any legislative history evidencing congressional intent to create or deny a private remedy. We read *Cort* and its progeny, including *California v. Sierra Club, supra*, and *Universities Research Ass'n, Inc. v. Coutu*, 49 U.S.L.W. 4354 (U.S. Apr. 6, 1981) (no private right of action under

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New York Univ., 442 F. Supp. 522, 523 (S.D.N.Y. 1978); *Barnes v. Converse Coll.*, 436 F. Supp. 635, 638 (D.S.C. 1977); *Gurmankin v. Costanzo*, 411 F. Supp. 982, 989 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977).

Davis-Bacon Act against private employers) as requiring a very close, even microscopic, examination of the legislative history of the particular statute involved. This reading of the legislative history must be done with an enlightened judicial eye, giving full attention to the underlying congressional purpose, the very heart of statutory analysis, *see* Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv. L. Rev. 370, 374-75 (1947); Wyzanski, *Judge Learned Hand's Contributions to Public Law*, 60 Harv. L. Rev. 348, 360-62 (1947); *WATCH v. Harris*, 603 F.2d 310 (2d Cir.), *cert. denied*, 444 U.S. 995 (1979), but also with a healthy skepticism of "casual statements from floor debates," as Justice Jackson warned us so pointedly in *Schwegmann Bros. v. Calvert Distillers Co.*, 341 U.S. 384, 396 (1951).

Taking such a view of section 503, we find nothing in the history of the original Rehabilitation Act of 1973 that casts any light on whether Congress intended to create a private right of action. Given Congress's initial silence, we may seek some guidance from the 1974 and 1978 amendments to the Act. In giving weight to these amendments, we would choose a midde road between the panel majority in *Rogers v. Frito-Lay, Inc.*, 611 F.2d at 1080 ("[W]hat happened after a statute was enacted may be history and it may come from members of the Congress, but it is not part of the legislative history of the original enactment"), and Judge Goldberg's dissent in *Rogers*, 611 F.2d at 1100 ("it is a well-established principle that the post-enactment treatment of a statute by Congress is cogent evidence of the intent of Congress at the time of its passage"). We believe our view is called for by *Cannon v. University of Chicago*, 441 U.S. at 686-87 n.7, in which the Court, while partially relying on subsequent legislative history, noted that "we cannot accord these remarks the

weight of contemporary legislative history. . . ." *See WATCH v. Harris*, 603 F.2d at 324-25; *North Haven Board of Education v. Hufstedler*, 629 F.2d 773, 783-85 (2d Cir. 1980), *cert. granted*, 49 U.S.L.W. 3617 (U.S. Feb. 24, 1981) (No. 80-986).

The subsequent legislative history of the Rehabilitation Act is internally conflicting. The 1974 amendments deal expressly with section 504, equating it with Title VI (42 U.S.C. § 2000d-1) (race discrimination) and Title IX (42 U.S.C. § 1683) (sex discrimination). Senate Report No. 93-1297, which urged overriding the President's veto of the 1974 amendments, expressly noted that section 504 permits a private right of action. *See* 1974 U.S. Code Cong. & Ad. News 6373, 6390.

In contrast, the Senate Conference Committee never explicitly stated that section 503 confers a private right of action. Although the report did state that "[i]t is intended that sections 503 and 504 be administered in such a manner that a consistent, uniform and effective Federal approach to discrimination against handicapped persons would result," *id.* at 6391, this appears to refer simply to the desirability of cooperation between the Department of Health, Education, and Welfare, which was assigned to enforce section 504, and the Department of Labor, which was assigned to enforce section 503. This separate assignment may even indicate that section 503, unlike 504, was not intended to be privately enforced; the Department of Labor, unlike the Department of Health, Education, and Welfare, lacked experience in dealing with private lawsuits. *See Rogers v. Frito-Lay, Inc.*, 611 F.2d at 1081 n.7.

The only indication that a "uniform" approach to combatting employment discrimination against the handicapped might entail a private right of action under section 503 as well as section 504 is the remarks of a senator who

was not a member of the conference committee, although he was one of the principal sponsors of the original Act and its subsequent amendments. Senator Robert Stafford of Vermont stated on the floor in 1974 that enforcement under both sections 503 and 504 should be similar to enforcement under Title VI and Title IX. 120 Cong. Rec. 30551 (1974). These remarks were not, however, included in the conference committee report. Furthermore, although an exchange of correspondence between the Senate Committee on Labor and Public Welfare and the Secretary of Labor regarding the enforcement of section 503 is appended to the report, nowhere in that correspondence is there any hint that the statute was to be enforced through private lawsuits. *See, e.g.*, 1974 U.S. Code Cong. & Ad. News 6425, 6429, 6430, 6438, 6439-40. The only portion of the exchange between Committee and Department dealing with complaints relates to the Department's taking "primary responsibility for enforcement of complaints" and the Senate Committee's concern that "there is too much emphasis given to the contracting agency's internal resolution of such complaints because there is no standard established in the [Labor Department's] regulations as to what is an effective or accepted internal review procedure." *Id.* at 6429.

With the exception of Senator Stafford's statement on the floor, then, the legislative intent demonstrated by the history of the 1974 amendments simply does not support implication of a private right of action under section 503. In 1978, however, when Congress again amended the Act by adding section 505 to provide for attorney's fees "[i]n any action or proceeding to enforce or charge a violation of [the Act]," 29 U.S.C. § 794a, the accompanying Senate Report clearly assumed that a private judicial remedy was available under section 503: "[T]he availability of attor-

ney's fees should assist in vindicating private rights of action in the case of section 502 and 503 cases, as well as those arising under section 501 and 504." S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978) (Human Resources Committee). H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 21 (1978) (Education and Labor Committee), *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312, 7332, spoke in exactly the same terms.[8]

Neither the Senate nor the House Reports, however, contained any reference to the existing case law from the district courts. Although two district court cases had found that there was a private right of action under section 503, *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. Fla. 1977); *Drennon v. Philadelphia General Hospital*, 428 F. Supp. 809 (E.D. Pa. 1977), three cases had held that no implied right of action existed, *Wood v. Diamond State Telephone Co.*, 440 F. Supp. 1003 (D. Del. 1977); *Moon v. Roadway Express, Inc.*, 439 F. Supp. 1308 (N.D. Ga. 1977), *aff'd, Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980); *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200 (N.D. Tex. 1977), *aff'd*, 611 F.2d 1074 (5th Cir. 1980).

This failure to note the conflicting case law of the time indicates that the reference to private rights of action being available in section 502 and 503 cases as well as those arising under sections 501 and 504 was inadvertent. This seems especially true in light of the Senate Report's extensive reference to the testimony of Deborah Kaplan of the Disability Rights Center before the Subcommittee on the Handicapped, S. Rep. No. 890, *supra*, at 18-20.

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[8] The House Report stated: "The new section permits courts, at their discretion, to award to the prevailing party, other than the United States, in any action to enforce sections 501, 503 or 504 of the act, a reasonable allowance to cover the costs of attorneys' fees."

Her testimony quoted in the Senate Report related only to sections 501 and 504:

> Unfortunately, the disabled citizens who are protected by section 501 as well as section 504 stand alone among minority groups in this country, since they remain largely unaffected by the recently enacted Civil Rights Attorney's Fees Awards Act of 1976, Public Law 94-559, and because the legislation which protects their civil rights contains no attorney's fees provision. Thus many disabled people, who desperately need to vindicate their rights through the courts, have been utterly frustrated and disillusioned because they could neither afford an attorney, locate one able to represent them without a fee, nor seek an attorney's fee award from the courts.

Id. at 19. We note also the Seventh Circuit's point in *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1242 (7th Cir. 1980), that allowing attorney's fees in actions or proceedings brought under section 503 may have been intended to provide for attorney's fees either in a section 503(b) proceeding before the Department of Labor or in a judicial proceeding brought pursuant to the Department of Labor's regulations permitting the director of the Office of Federal Contract Compliance Programs (OFCCP) to seek appropriate judicial action to enforce the affirmative action contractual provisions required under the Act. *See* 41 C.F.R. § 60-741.28(b) (1980).[9] In

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[9] Section 60-741.28(b) of the regulations reads as follows:

> *Judicial enforcement.* In addition to the administrative remedies set forth herein, the Director may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions . . . including appropriate injunctive relief.

short, even giving appropriate weight to the subsequent legislative history reflected in the 1978 amendment, we find nothing that compels us to the conclusion that a private right of action exists under section 503. The assumption in the 1978 congressional reports simply "cannot be relied upon as a faithful indicator of prior congressional intent." *Simpson v. Reynolds Metals Co.*, 629 F.2d at 1243.

Given the somewhat ambiguous legislative history, however, we must proceed to the third question under *Cort v. Ash:* whether it is consistent with the underlying purposes of the legislative scheme to infer a private right of action for the handicapped person discriminated against by his employer. Here we note, as did the *Rogers* majority, 611 F.2d at 1084, that Congress provided a rather complete administrative scheme to remedy section 503 violations and that the implementing regulations, 41 C.F.R. §§ 60-741.4 to 60-741.54 (1980), emphasize resolving complaints to the Department of Labor "by informal means, including conciliation, and persuasion, whenever possible," *id.* § 60-741.28(a). The regulations provide as remedies withholding of progress payments, termination of existing contracts, or debarment from receiving future contracts, *id.* § 60.741-28(c) to (e), rather than remedies running to the discriminated-against employee. In this regard, the administrative procedures established by the Act and implementing regulations are remarkably consistent with those under the Comprehensive Employees Training Act (CETA) discussed in *CETA Workers' Organizing Committee v. New York*, 617 F.2d 926 (2d Cir. 1980). Although the scheme for implementation of the CETA provided in CETA § 106, 29 U.S.C. § 816, may be somewhat more sophisticated than that provided for by section 503 of the Rehabilitation Act—the Rehabilitation

Act regulations contain no deadlines for the processing of complaints, 41 C.F.R. § 60-741.26(e) (1980)—we cannot find this distinction between the cases very significant. Rather, as in *CETA Workers,* 617 F.2d at 933-34, we believe that the underlying congressional purpose was to provide an administrative procedure for the determination of complaints under which the administering agency was to use its powers to enforce the section in question. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,* 49 U.S.L.W. 4783, 4787 (U.S. June 25, 1981); *Transamerica Mortgage Advisors,* 444 U.S. at 19. And though the Rehabilitation Act failed directly to provide for judicial review of such an administrative procedure, the Department of Labor evidently thought that such review might be possible, as indicated by regulation section 60-741.28(b). The implementing regulations do incorporate the elaborate and sophisticated hearing practice and procedure used to enforce equal opportunity under Executive Order No. 11,246, *reprinted in* 41 C.F.R. part 60-30, *see* 41 C.F.R. § 60-741.29(b) (1980); these elaborate hearing provisions culminate, or may culminate, in a final administrative order, *id.* § 60-30.37, which is in our view reviewable like other administrative orders under the Administrative Procedure Act and particularly 5 U.S.C. §§ 701-706.

To be sure, the regulations' failure to specify time limits has presented a problem that is particularly evident in the case at bar. The Department of Labor has, contrary to the will of Congress, been unable to comply speedily with the provisions of the Rehabilitation Act. This has resulted in the Department's taking the position in the past, although it takes no position here, that a private cause of action should be permitted in order to remedy section 503 violations more effectively and indeed an

acknowledgment that "[t]he net effect of [OFCCP] discretion is that there is no assurance that compliance decisions are not tempered by political, procurement, personal or other potentially competing or conflicting requirements," OFCCP Task Force, Preliminary Report on the Revitalization of the Federal Contract Compliance Program (1977), *quoted in Rogers v. Frito-Lay, Inc.*, 611 F.2d at 1106 (Goldberg, J., dissenting). The agency backlog and its position in favor of recognition of a private remedy are set forth in an affidavit by the director of the OFCCP, quoted in an appendix to the *Rogers* opinion, 611 F.2d at 1108-09, and submitted in an *amicus* brief to Judge Lasker in *Chaplin v. Consolidated Edison Co. of New York, Inc.*, 482 F. Supp. 1165, 1172 (S.D.N.Y. 1980). While lack of executive resources to enforce an act of Congress is regrettable, it is hardly the judiciary's role to redress that lack by inferring a judicial remedy. *See Piper v. Chris-Craft Industries*, 430 U.S. 1, 41 (1977); *Riegel Textile Corp. v. Celanese Corp.*, 649 F.2d 894, 904-05 (2d Cir. 1981).

Moreover, although a department's position on whether an implied private cause of action exists is entitled to judicial consideration, *see Cannon*, 441 U.S. at 686-88; *cf. North Haven Board of Education*, 629 F.2d at 777 (a court should "give due weight to the contemporaneous construction of a statute by the agency charged with its administration"), an agency's expertise, "[e]ven if the agency spoke with a consistent voice, . . . is of limited value when the narrow legal issue is one peculiarly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants." *Piper v. Chris-Craft Industries*, 430 U.S. at 41 n.27. *See Riegel Textile Corp. v. Celanese Corp.*, 649 F.2d at 897 n.4. As Judge Learned Hand stated:

> [I]t is doubtful whether in the end one can say more than that there comes a point at which the courts must form their own conclusions. Before doing so they will, of course—like the administrative tribunals themselves—look for light from every quarter, and after all crannies have been searched, will yield to the administrative interpretation in all doubtful cases; but they can never abdicate.

Niagara Falls Power Co. v. FPC, 137 F.2d 787, 792 (2d Cir.), *cert. denied*, 320 U.S. 792 (1943).

In any case, an after-the-fact acknowledgment of inadequacy because of limited departmental resources is not the equivalent of a long-held, firmly established, well-reasoned position that the agency has made known to Congress and to the courts over the years, such as in *Cannon*, 441 U.S. at 688 n.8, or in *North Haven Board of Education*, 629 F.2d at 783-84. Indeed, the record here contains no such similar statement by the agency. *Cf. Simpson v. Reynolds Metals Co.*, 629 F.2d at 1244 (discussing the OFCCP's representation of inadequacy in *Rogers* and *Chaplin* but noting the absence of any such representation in the record in that case).

We need not deal with the fourth *Cort v. Ash* factor; it is plain enough that discrimination against the disabled has not been a matter traditionally relegated to state law. But we conclude, as have the other three courts of appeals that have passed upon the question, that no implied private right of action exists under section 503, recognizing that the glass through which we see is by no means crystal clear but is so cloudy as to be barely translucent.

Judgment reversed.

KAUFMAN, *Circuit Judge,* (dissenting:)

The majority holds that handicapped individuals have no private right of action under § 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793. It takes this rigid position in the face of appellant's charge that United Airlines discriminated against him because of his handicap since it believes that the demands of the four-factor *Cort* test have not been met. I cannot agree. A careful analysis in keeping with the *Cort* approach does not compel this harsh result to Davis, a diagnosed epileptic placed on unpaid "extended illness status" and then terminated by his employer. Accordingly, I dissent.

The threshold question under *Cort* is whether the plaintiff was one of the class for whose "especial benefit" § 503 was enacted. *Cort* v. *Ash,* 422 U.S. 66, 78, 80-82 (1975). This inquiry focuses on whether Congress intended to benefit a clearly defined class rather than to protect the general public. *Cannon* v. *University of Chicago,* 441 U.S. 677, 690-92 (1979). Looking to the language of the statute may provide evidence of this intent. *Id.* Here, the language of § 503 (a) and (b) specifically identifies the class, "handicapped individuals," and provides equal employment opportunities for all who fall within it. Indeed, relying on this approach to the first *Cort* factor, virtually all of the district courts analyzing § 503, including those that ultimately found no private right of action, have concluded that the statute was enacted for the "especial benefit" of the handicapped. *See, e.g., California Paralyzed Veterans Assn.* v. *FCC,* 496 F. Supp. 125, 128-29 (C.D. Cal. 1980); *Hart* v. *County of Alameda,* 485 F. Supp. 66, 68 (N.D. Cal. 1979); *Anderson* v. *Erie Lackawanna Ry. Co.,* 468 F. Supp. 934, 936 (E.D. Ohio 1979).

The majority, however, contends that when § 503 is examined for "right- or duty-creating language," *Cannon* v. *University of Chicago, supra,* 441 U.S. at 690 n.13, no indication of an intention to establish a federal right in favor of the plaintiff can be found. *See Cort* v. *Ash, supra,* 422 U.S. at 78. While the absence of such a "talismanic incantation," *Rogers* v. *Frito-Lay, Inc.,* 611 F.2d 1074, 1092 (5th Cir.) (Goldberg, J. dissenting), *cert. denied,* 101 S.Ct. 246 (1980), is less relevant than the substance of the obligations created, the affirmative action language of § 503 may appear to create, when scrutinized closely, a duty for federal agencies, it is argued, not for employers. *Rogers* v. *Frito-Lay, Inc., supra,* 611 F.2d at 1079.

Although the duty-creating phrases are not conclusive in either direction, an analysis of the second and more important *Cort* factor, contrary to the majority's position, offers exceedingly strong evidence for giving a right of action to the handicapped individual. In considering whether the legislative history of § 503 sheds light on the private right of action question, *see Cort* v. *Ash, supra,* 422 U.S. at 78, three statutes carry weight and are directly relevant to our determination: the 1973 Rehabilitation Act, the Rehabilitation Act Amendments of 1974, and the attorney's fees provisions of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978.

I do not quarrel with the assertion that the legislative history of the 1973 Act provides little assistance. Debate primarily focused on the establishment of federally-funded programs for the handicapped, not on the relatively non-controversial antidiscrimination provisions of §§ 503 and 504. Nor is an examination of the history surrounding the 1974 Amendments to the Act particularly

enlightening, because discussion centered on redefining "handicapped individual," not on explicating the full meaning of §§ 503 and 504. The conference report, however, lends guidance. It states that § 504 permits a "judicial remedy through private action," S. Conf. Rep. No. 93-1270, 93rd Cong., 2d Sess. 25, 26 (1974), and notes, as the majority recognizes, that both sections will be administered to effect a uniform approach to discrimination against handicapped persons. *Id.* at 27. Such language, I believe, should fairly be read to suggest that, since Congress recognized a private right of action under § 504, such a remedy would not be inconsistent with Congress's purpose in § 503. *See Rogers* v. *Frito-Lay, Inc., supra,* 611 F.2d at 1096 (Goldberg, J. dissenting). In addition, during the Senate debate, Senator Robert Stafford, one of the principal sponsors of the original Act and its later amendments, stated that enforcement of both sections would be similar to that of § 601 of the Civil Rights Act and § 901 of the Education Amendments of 1972. 120 Cong. Rec. 30551 (1974). Although a private right of action was found to exist for the Education Amendments in *Cannon, supra,* the majority denigrates the value of Senator Stafford's remarks.

More conclusive evidence of a congressional intent to authorize a private action is found in the 1978 attorney's fees amendments. 29 U.S.C. § 794(b). This provision explicitly presumes private judicial actions because attorney's fees are made available to parties "other than the United States" and because the language looks to actions before "courts," not administrative agencies. The Senate Report and Senate debates also indicate that private actions were envisioned. The majority concedes that the accompanying Senate Report explicitly stated that the availability of attorney's fees was intended to aid handi-

capped individuals in "vindicating private rights of action in the case of section . . . 503 cases." S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978). The majority further acknowledges that H.R. Rep. No. 1149, 95th Cong., 2d Sess. 21 (1978), *reprinted in* U.S. Code Cong. & Ad. News 7312, 7332, took precisely the same position.

My brothers have decided that this legislative material is "unpersuasive" and virtually dismiss it. They adopt the rationale that failure to discuss the then-existing case law indicates that references to the availability of a § 503 private right of action were "inadvertent." I realize that "even Homer nods," but such a bald refusal to acknowledge a clear, express statement of congressional intent is inexcusable. Granted, the evidence surrounding the passage of the 1978 attorney's fees amendments carries less weight than contemporary legislative history, this evidence is strongly relevant in determining what members of Congress assumed they had done several years previously. It is clear from the legislative history that Congress premised the attorney's fees provision on the existence of an implied remedy. Furthermore, interpreting an attorney's fees amendment to reveal Congress's intent is surely not a novel method of construction, as the majority's position would appear to suggest. In *Cannon*, interpretation of the legislative background of the attorney's fees amendment to § 901 of Title IX served as the basis for the Court's recognition of a private right of action. *See Cannon* v. *University of Chicago, supra,* 441 U.S. at 686 n.7. Indeed, Congress is generally considered to be a creditable interpreter of its actions, and judicial deference to these interpretations is appropriate. *See, e.g., Chrysler Corp.* v. *Brown,* 441 U.S. 281 (1979); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969); *Federal Housing Administration* v. *The Darlington, Inc.,* 358 U.S. 84 (1958).

Here, the notion that the view of a subsequent Congress forms a weak foundation for inferring the intent of an earlier one, *see Consumer Product Safety Comm'n.* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980), is not a persuasive argument. Many members of the relevant committees in 1978 were also members of those committees in 1973. I doubt that these distinguished members of Congress who labored over trail-blazing legislation would have forgotten what they had intended a mere five years before the 1978 amendments. Contrary to the majority's poorly-supported and tenuous conclusion that the legislative history is ambiguous, the legislative history clearly indicates that Congress, in passing the attorney's fees amendments of 1978, assumed that a private right of action was created with the passage of § 503 in 1973. This assumption does not reflect a subsequent desire to amend the original enactment; rather, it illuminates the initial intent of the draftsmen.

The third factor of the *Cort* analysis considers whether a private right of action would support Congress's purpose in enacting the statutory scheme. *See Cort* v. *Ash, supra,* 422 U.S. at 78. Implication of a private right of action is not inconsistent with the underlying purpose of § 503—effective administrative enforcement. The Department of Labor and its office of Federal Contract Compliance Programs, it is interesting to note, have stated that the existence of an implied remedy would enhance informal conciliation and administrative enforcement in general. *See Chaplin* v. *Consol. Edison Co. of N.Y., Inc.*, 482 F. Supp. 1165, 1172 (S.D.N.Y. 1980). Although the majority lightly dismisses these agency opinions, courts generally believe they are deserving of substantial weight. *See, e.g., Miller* v. *Youakim,* 440 U.S. 125 (1979); *Red Lion Broadcasting Co.* v. *FCC, supra.*

My brothers, in concluding that the mandates of the third *Cort* factor are not fulfilled, rely on an analysis contained in *CETA Workers' Org. Comm.* v. *City of New York*, 617 F.2d 926 (1980). Such reliance is misplaced because *CETA* is readily distinguishable. The statutory presumption in favor of administrative enforcement is much more potent under the Comprehensive Employment and Training Act ("CETA") than it is under the Rehabilitation Act. Section 106 provides, in great detail, a sophisticated scheme for enforcement of CETA. In particular, the Secretary of Labor is required to reach a final determination on a complaint within 120 days. CETA § 106(b), 29 U.S.C. § 816(b). This complex enforcement mechanism suggests the "primacy" and "exclusivity" of the administrative grievance procedures. *CETA Workers' Org. Comm.* v. *New York, supra,* 617 F.2d at 931.

No such detailed machinery exists under the Rehabilitation Act, and even the accompanying Regulations contain no deadlines for the processing of complaints. 41 C.F.R. § 60-741.26 (e) (1980) ("The Department of Labor shall institute a prompt investigation of each complaint . . ."). Surely, it does not require straining the legislative interpretation to envision a private right of action complementing the statutory enforcement mechanism for § 503. Indeed, the Department of Labor endorses this view. I submit that analysis of the third *Cort* factor differs for the two statutes. More importantly, it indicates that Congress would be more inclined to create a private right of action for a statute where provisions for administrative enforcement are not detailed and precise. But the majority, admitting that the CETA scheme is more fully developed, still finds the distinctions between the two of little significance even in light of the Department of Labor's statement that an implied right of action for § 503 viola-

tions should be permitted. The majority, it appears, attaches greater weight to tangential *exempla* than to direct, explicit evidence.

My brothers do not contend that the requirements of the fourth *Cort* factor—preemption of matters typically the concern of state courts—have not been met. As they acknowledge, invidious discrimination has always been addressed by federal legislation. *Cannon* v. *University of Chicago, supra,* 441 U.S. at 708-09 (citing *Steffel* v. *Thompson,* 415 U.S. 452, 464 (1974)).

In light of what I have said, I would hold that a private right of action under § 503 is clearly authorized. Handicapped persons are the "especial class" Congress meant to benefit from the enactment of § 503, and the 1978 attorney's fees amendments demonstrate that Congress assumed that the 1973 Congress intended to create this private right of action. Moreover, implication of a private right of action is not inconsistent with the goal of administrative enforcement of the statute's antidiscrimination provisions. We should be mindful that the handicapped must overcome not only physical and mental obstacles to full participation in society but also must surmount the barriers raised by discrimination caused by society's attitude toward them. Congress in § 503 sought to safeguard them from such discrimination and this protection includes providing for a private right of action.

I am aware that recent Supreme Court decisions counsel that private remedies are not to be inferred cavalierly, and, therefore, a cautious analysis is in order. The majority, however, has taken this advice to the extreme and has failed to acknowledge exceptions that have been carved out and clear indications of congressional purpose. I believe the only reasonable conclusion to be reached from

applying the *Cort* analysis is that Congress intended handicapped individuals to have a private remedy under § 503. If the legislative history is not clear and precise, as the majority believes, Justice Holmes's counsel should not be ignored. He instructed us in 1908 that "[where Congress] has intimated its will, however indirectly, that will should be recognized and obeyed. . . . [I]t is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson* v. *United States,* 163 F. 30, 32 (1st Cir. 1908). The general scheme of the legislation, indeed, indicates that Congress, in affording new rights and privileges to the handicapped, wished to redress the inequities borne by them. To hold otherwise is to take from an entire group of individuals who suffer odious discrimination an important right given them by Congress.

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APPENDIX B

Opinion of the District Court for the Eastern District of New York, Dated November 5, 1980

MEMORANDUM AND ORDER

WEINSTEIN, Chief Judge.

Plaintiff Davis, a former employee of United Airlines who suffers from epilepsy, brought suit against United Airlines under Section 503 of the Vocational Rehabilitation Act, 29 U.S.C. 793 (West 1975 and Supp. 1979). He alleges that United has deprived him of employment opportunities in violation of the Act by placing him on "permanent sick leave" and relieving him of his duties as a ramp service worker solely because of his epileptic condition.

Section 503(a) of the Vocational Rehabilitation Act provides that every contract in excess of $2,500 entered into by a Federal department or agency shall contain a clause requiring the party contracting with the government to take affirmative action to employ and advance in employment qualified handicapped individuals:

> §793. Employment Under Federal Contracts
>
> Amount of contracts or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations
>
> (a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal proverty [sic] and non-personal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action

> to employ and advance in employment qualified handicapped individuals as defined in Section 706(7) of this title. . . .
>
> (b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

29 U.S.C. §793.

Defendant moves for judgment on the pleadings on the grounds that 1) no private right of action exists under Section 503, and 2) plaintiff has not exhausted his administrative remedies.

The question of whether such a right of action exists has been the subject of sharp disagreement among the district courts that have considered it; the number of courts choosing to imply a private right of action under the section is roughly equal to the number of courts declining to do so. Compare Hart v. County of Alameda, No. C-79-0091, slip op. at 12 (N.D. Cal. September 5, 1979) (implying a private right of action); Simon v. St. Louis, No. 77-1140 C(4), slip op. at 2 (E.D. Mo. January 31, 1978) (same); Duran v. City of Tampa, 430 F.Supp. 75, 78 (M.D. Fla. 1977) (same); Drennon v. Philadelphia General Hosp., 428 F.Supp. 809, 814 (E.D. Pa. 1977) (same), with Miglets v. Erie Lackawanna Ry. Co., 19 E.P.D. P9191, 19 FEP Cases 379 (N.D. Ohio February 28, 1979) (no private right of action under section 503); Anderson v. Erie Lackawana Ry. Co., 468 F.Supp. 934, 940 (N.D. Ohio 1979) (same); Wood v. Diamond State Telephone Co., 440 F.Supp. 1003, 1010

(D. Del. 1977) (same). The Fifth and Seventh Circuits, the only courts of appeals to have considered the question, have resolved it against implication, the Fifth Circuit only narrowly over a strong dissent by Judge Goldberg. Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980), affirming Moon v. Roadway Express, Inc., 439 F.Supp. 1308 (N.D. Ga. 1977) and Rogers v. Frito-Lay, Inc., 433 F.Supp. 200 (N.D. Tex. 1977); Simpson v. Reynolds Metals Co., 23 FEP Cases 868, 876-78 (7th Cir. 1980). The Southern District of New York is itself divided on the issue. Compare Chaplin v. Consol. Edison Co. of N.Y., 482 F.Supp. 1165 (S.D.N.Y. 1980) (Lasker, J.) (implying a private cause of action) with Langman v. Western Electric Co., 23 E.P.D. ¶31,054 (S.D.N.Y. March 14, 1980) (Knapp, J.) (refusing to imply one).

While obviously the question is a close one, Judge Lasker's opinion and those from other districts which have found a private

right of action to exist under Section 503 seem persuasive. The factors identified by the Supreme Cout in Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 26 (1975) as relevant to the question of whether implication of a private right of action is appropriate in a particular case here argue strongly in favor of implication. Plaintiff is obviously one of the class "for whose especial benefit" Section 503 was enacted; the existing indications of legislative intent all point in the direction of the implication; and it is, finally, "consistent with the underlying purpose" of the Vocational Rehabilitation Act to allow private enforcement of rights created by the Act to coexist with the administrative enforcement mechanism described by the statute. 29 U.S.C. 793(b). It is desirable that the two remedies should so coexist.

We hold that a private right of action does exist under Section 503(a) of the Vocational Rehabilitation Act. Defendant's motion

for judgment on the pleadings is therefore denied since under today's holding plaintiff has stated a claim upon which relief can be granted.

United Airlines' further contention that plaintiff is required to exhaust his administrative remedies before maintaining this suit is dismissed as without merit. Where, as here, neither the participation of the aggrieved individual nor individual relief is provided by the administrative scheme, the exhaustion of administrative remedies is not a prerequisite to the maintenance of an individual lawsuit. Cannon v. University of Chicago, 441 U.S. 677, 707 n.41, 99 S.Ct. 1946, 1962 n. 41 (1979); Chaplin v. Consol. Edison Co. of N.Y., Inc., 482 F.Supp. 1165, 1174 (1980).

Defendant's final argument that the doctrine of primary jurisidiction precludes suit at this time is rejected on the same grounds. Chaplin v. Consol. Edison of N.Y.,

Inc., 482 F.Supp. 1165, 1174 n.11 (S.D.N.Y. 1980); cf. Drennon v. Philadelphia General Hosp., 428 F.Supp. 809, 818 (E.D. Pa. 1977).

It had been this court's intention to await anticipated developments in two cases heavily relied upon by the defendant, and to that end defendant's initial motion for judgment on the pleadings was denied without prejudice. On October 6, 1980, however, the Supreme Court denied a petition for a writ of certiorari in the case of Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980), cert. denied, 49 U.S.L.W. 3250, October 6, 1980. Furthermore, it now appears that there is no foreseeable appeal to the Second Circuit to be taken from Langman v. Western Electric, 23 E.P.D. ¶31,054 (S.D.N.Y. March 14, 1980) since several issues remain to be tried in the district court. We have been informed that the other Southern District case, Chaplin v. Consolidated Edison Co. of N.Y., 482 F.Supp. 1165 (S.D.N.Y. 1980), has been settled.

Mindful of the conflict within the federal courts and within the Second Circuit surrounding the question of whether a private right of action is properly implied under Section 503 of the Vocational Rehabilitation Act, this court certifies, in accordance with 28 U.S.C. §1292(b), that the order denying United Airlines' motion for judgment on the pleadings involves a "controlling question of law as to which there is substantial ground for difference of opinion" and that an immediate appeal from it may "materially advance the ultimate termination of this litigation."

So ordered.

Dated: Brooklyn, New York
November 5, 1980

s/Jack B. Weinstein
Chief Judge, U.S.D.C.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-440

THOMAS DAVIS,

Petitioner

v.

UNITED AIR LINES, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of cousel for petitioner, IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

February 14, 1982

/s/ Thurgood Marshall
Associate Justice
of the Supreme Court
of the United States

Dated this 25th
day of November, 1981

APPENDIX D: Relevant Statutory Provisions

29 U.S.C. §793

Employment under Federal contracts

Amount of contracts or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations

(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal proverty [sic] and non-personal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying

out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

Administrative enforcement; complaints; investigation; departmental action

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant,

consistent with the terms of such contract and the laws and regulations applicable thereto.

Waiver by President; national interest special circumstances for waiver of particular agreements

(c) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which he shall prescribe, when he determines that special circumstances in the national interest so require and states in writing his reasons for such determination.

Pub.L. 93-112, Title V, §503. September 26, 1973, 87 Stat. 393.

Opposition

No. 81-1521

Supreme Court, U.S.
FILED
APR 14 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS DAVIS,

Plaintiff,

vs.

UNITED AIR LINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Was the United States Court of Appeals for the Second Circuit correct in holding that no private right of action may be implied from Section 503 of the Rehabilitation Act of 1973, 29 U. S. C. § 793?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS DAVIS,

Plaintiff,

vs.

UNITED AIR LINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTRODUCTION

Respondent United Air Lines, Inc. ("United") herein opposes the Petition For Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit. That decision correctly interpreted Section 503 of the Rehabilitation Act as not providing a private right of action and need not be reviewed by this Court.

COUNTERSTATEMENT OF THE CASE

United does not substantially disagree with Petitioner's statement of the case.[1] United has answered the complaint and has denied any discriminatory conduct with regard to Petitioner. Nevertheless, for purposes of this petition, this Court, like the U. S. Court of Appeals for the Second Circuit, should assume:

> "... that Davis is physically handicapped within the meaning of the Act, see 29 U. S. C. § 706(6), that United holds government contracts subject to the requirements of Section 503, and that Davis was discharged because of his handicap". 662 F. 2d at 122.[2]

REASONS FOR DENYING THE WRIT

The opinion of the Second Circuit, *Davis* v. *United Air Lines, Inc.*, 662 F. 2d 120 (2d Cir. 1981), was correctly reasoned and soundly based on relevant decisions of this Court. Moreover, its holding is consistent with the conclusion of every Circuit Court of Appeals to have considered the same issue presented by the Petition: *Fisher* v. *City of Tucson*, 663 F. 2d 861 (9th Cir. 1981); *Simpson* v. *Reynolds Metals Company, Inc.*, 629 F. 2d 1226 (7th Cir. 1980); *Rogers* v. *Frito-Lay, Inc.*, 611 F. 2d 1074 (5th Cir. 1980); *cert. denied*, 449 U. S. 889 (1980); *Hoopes* v. *Equifax, Inc.*, 611 F. 2d 134 (6th Cir. 1979). Thus, while a minority of the U. S. District Courts which have

---

[1] See Petition for Writ of Certiorari filed February 12, 1982, hereinafter referred to as "Petition".

[2] The decision of the Second Circuit, attached to the Petition as Appendix A, has been reported at 662 F. 2d 120 (2d Cir. 1981). Respondent looks to that decision which, of course, speaks for itself rather than accepting or rejecting Petitioner's description of what the Court held and the rationale for its holdin ɜ as purportedly set forth in Petitioner's statement of the case.

ruled on this issue have reached a different result, there is unanimity among Circuit Courts that Section 503 does not provide a private right of action.

The analysis used by each Circuit Court to determine whether Section 503 implies the availability of a private right of action is based on the standards established by this Court in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975), and further interpreted in a trilogy of cases, *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979); *Touche Ross & Co.* v. *Redington*, 442 U. S. 560 (1979); and *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11 (1979). In this case, the Second Circuit agreed with the other Circuits that three of the four *Cort* standards for implying a private right of action are not met by Section 503, i.e., (1) Section 503 was not enacted for the special benefit of the handicapped as a class embodied with especially created rights;[3] (2) the legislative history of Section 503 fails to support implication of a private right of action; and (3) private rights of action would be inconsistent with the administrative scheme established by Congress and implemented by the Department of Labor.

The Petition offers no persuasive reason for the Court to review a decision so soundly grounded in controlling precedent. Moreover, there is no disagreement among the Circuits and only minor dissent among the District Courts that a private cause of action may be inferred from Section 503 of the Act.

Grasping for a reason for this Court to hear the case, Petitioner also points to an alleged inadequacy of the adminis-

[3] The Ninth Circuit in *Fisher* v. *City of Tucson*, 663 F. 2d 861, 863-64 (9th Cir. 1981), found the first criterion of *Cort* v. *Ash* to be satisfied but not the second or third. The fourth *Cort* factor, whether the matter has traditionally been relegated to state law, has been summarily held to be met by Section 503 by each Circuit since laws against discrimination are chiefly matters of federal concern.

trative procedure expressly prescribed by Congress in Section 503(b) of the Act. While United disagrees with the underlying premise of inadequacy, this policy argument is clearly one to be presented to the Congress, not to this Court, for it raises the most obvious of political questions.

Finally, the law is basically settled on this issue; no decision by this Court is necessary. Contrary to Petitioner's assertion that it will have some bearing on the implication of private rights of action under other antidiscrimination statutes, the decision of the Second Circuit for which review is sought applied the *Cort* standards to this particular statute as intended by this Court. Implication of private rights under other statutes must be analyzed by those same standards.

Review should accordingly be denied.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT CONGRESS DID NOT INTEND TO CREATE A PRIVATE REMEDY TO ENFORCE SECTION 503 OF THE REHABILITATION ACT

In reviewing the claim that Section 503 of the Rehabilitation Act of 1973, as amended, ("the Act"), 29 U. S. C. § 793, should be read to imply the availability of a private right of action against employers with federal contracts, the Court of Appeals recognized as its starting point the four factors set out in *Cort* v. *Ash,* 422 U. S. 66, 78 (1975). Each factor was appropriately analyzed by the Court which, like every other Circuit Court to have considered the issue, reached the inescapable conclusion that Section 503, did not create such a private remedy.

The Second Circuit's approach was correct. At bottom, however, this Court has pronounced that:

> "The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction."

Transamerica Mortgage Advisors, Inc. v. *Lewis,* 444 U. S. 11, ____ 100 S. Ct. 242, 245 (1979); *Touche Ross & Co.* v. *Redington,* 442 U. S. 560, 568 (1979); *Cannon* v. *University of Chicago,* 441 U. S. 677, 688 (1979). Furthermore,

> "[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted." *Ibid.*

In this case, the language, the sparse legislative history and the provision for an administrative remedy all point to a Congressional intent not to create a private remedy under Section 503 of the Act. No further inquiry is either necessary or appropriate.

A. The Court of Appeals Correctly Held That Section 503 Was Not Enacted for the "Especial Benefit" of the Petitioner

By its terms, Section 503 mandates the Federal Government to include in its contracts a provision requiring contractors to take affirmative action to employ and to advance in employment qualified handicapped individuals. This mandate generally and indirectly should result in a benefit to handicapped persons such as the Petitioner. That is a far cry, however, from holding that the statute was enacted for his "especial benefit" as required under *Cort* v. *Ash.*

This Court's analysis in *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S. 11, 100 S. Ct. 242 (1979), is likewise controlling here. In *Transamerica,* the Court reviewed two sections of the Investment Advisors Act of 1940, 15 U. S. C. §§ 80b-1, *et seq.* The Court held Section 215 of that Act, 15 U. S. C. § 80b-15, to reflect Congress' intention to render certain contracts void thereby implying that actions could be maintained by investors for recission or restitution of those contracts. By way of contrast, Section 206 of the Investment Advisors Act, 15 U. S. C. § 80b-6, was held not to provide a private cause of action for damages. The Court noted that both sections were generally intended to benefit the clients of investment advisors, 444 U. S. at ____, 100 S. Ct. at 246; however:

> "Unlike §215, §216 simply proscribes certain conduct, and does not in terms create or alter any civil liabilities." 444 U. S. at ____, 100 S. Ct. at 247.

The Court in *Touche Ross & Co.* v. *Redington,* 442 U. S. 560, 569 (1979), also refused to imply a private right of action from Section 17(a) of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78q(a), stating:

> "[I]n those cases finding such implied private remedies the statute in question at least prohibited certain conduct or created federal rights in favor of private parties . . . By

> contrast, § 17(a) neither confers rights on private parties nor proscribes any conduct as unlawful." (Citations omitted.)

Section 503 of the Act, like Section 206 of the Investment Advisors Act, does not in terms create or alter any civil liabilities. Indeed, like Section 17(a) of the Securities Exchange Act of 1934, Section 503 neither confers rights on private parties nor proscribes any conduct as unlawful. Section 503 only requires a contract provision in certain Federal contracts. Accordingly, the Second Circuit concurred with the Fifth Circuit in *Rogers* v. *Frito Lay, Inc., supra,* 611 F. 2d at 1079-80, that the use of duty-creating rather than right-creating language, "though not conclusive, makes inference of a private cause of action more difficult." *Davis,* 662 F. 2d at 123; *Cannon* v. *University of Chicago,* 441 U. S. 677. 690-93 (1979).[4]

Petitioner also urges the Court to find evidence that Congress intended to benefit the handicapped in the administrative enforcement mechanism provided in Section 503(b) (Petition, p. 17).[5] That provision authorizes any handicapped individual to complain to the Department of Labor if he believes a contractor has failed or refuses to comply with the provisions of his contract with the Government relating to employment of handicapped individuals. The mechanism itself is a recognition that Congress placed an obligation on the Government to enforce the contractual requirements of Section 503(a) and that Petitioner is only an incidental beneficiary of that obligation. Accordingly, it lends no support to Petitioner's claim to be an "especial" beneficiary.

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[4] As previously noted, the Fifth, Seventh and now the Second Circuits have agreed that the first *Cort* test is not met by Section 503. Only the Ninth Circuit disagree on this point.

[5] Ironically, Petitioner elsewhere argues that this mechanism is inadequate.

In sum, the Court of Appeals was correct in holding that the first *Cort* test was not met.

B. The Legislative History of Section 503 Does Not Support Implication of a Private Cause of Action

Since Section 503 neither expressly provides for nor prohibits a private remedy other than the administrative process set forth in Section 503(b), the Second Circuit properly combed the legislative history for evidence of Congress' intent. 662 F. 2d at 123.[6] Nevertheless, after "a very close, even microscopic, examination of the legislative history" of the Act, the Court could "find nothing in the history of the original Rehabilitation Act of 1973 that casts any light on whether Congress intended to create a private right of action." *Ibid.*

The Court then reviewed the history of the 1974 amendments.[7] It found that the Senate Conference Committee expressly noted that Section 504 of the Act, 29 U. S. C. § 794, permits a private right of action but did not likewise state that Section 503 did so. 662 F. 2d at 124, citing S. Rep. No. 93-1297, 93rd Cong. 2d Sess., 1974 U. S. Code Cong. & Ad. News 6373, 6390. The Court also found, in agreement with the Fifth Circuit in *Rogers* v. *Frito Lay, supra,* 611 F. 2d at 1081 n.7, that Congress' separate assignment to two agencies of administrative responsibility for Sections 503 and 504 likely demonstrated its intention that Section 504 was to be privately enforced and that Section 503 was not. After further analysis of isolated remarks, the Court concluded that the history of the 1974 amendments does not support implication of a private right of action under Section 503. 662 F. 2d at 124.

Finally, the Second Circuit considered the amendments to the Act in 1978 which added Section 505 to the Act, 29 U. S. C.

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[6] See *California* v. *Sierra Club,* ____ U. S. ____, 101 S. Ct. 1775 (1981); *Universities Research Assn. Inc.* v. *Coutu,* 450 U. S. 754, 101 S. Ct. 1451 (1981).

[7] Petitioner totally ignored this part of the Court's opinion in his Petition.

§ 794a, in order to provide attorneys fees in "any action or proceeding to enforce or charge a violation of [the Act]." Petitioner asserts that this broad provision and its accompanying history is "dispositive" regarding Congressional intent. (Petition, p. 19).

Initially, what Congress might have thought more than five years after the fact about the actions of a different Congress is of virtually no relevance to the issue of unexpressed Congressional intent at the time of enactment. The Second Circuit struck an appropriate balance between according subsequent remarks no weight and giving such "history" limited value as cogent evidence of what had been previously intended. 662 F. 2d at 124. As this Court has noted: [W]e cannot accord these remarks the weight of contemporary history . . ." *Cannon* v. *University of Chicago,* 441 U. S. 677, 686-687 n. 7 (1979). Clearly, a private cause of action, not intended when Section 503 was passed, cannot be resurrected by the subsequent commentary of a small number of Congressmen.

Moreover, by 1978, Congress was already aware of the early split in interpretive decisions of the U. S. District Courts prior to Circuit Court review, had expressed its view in 1974 that Section 504 of the Act does provide a private right of action and had provided an administrative forum for complaints under Section 503 but not 504. To suggest that Congress intended *sub silentio,* to create a private right under Section 503 would be to attribute to that body an incompetence not borne out by its efforts in other remedial legislation. Congress could, therefore, only have intended in 1973 to create an administrative remedy for violations of Section 503 and, in 1978, to provide attorneys fees for actions or proceedings already authorized to enforce or charge violations of the Act.

Although Petitioner concedes that: "It is not the function of the courts to improve upon the statutory scheme intended by the legislature" (Petition, p. 24), that is fundamentally what he

asks this Court to do if review is granted.[8] There is no need for this Court to re-evaluate the legislative history already fully considered by the U. S. Courts of Appeals which have unanimously decided that Congress did not intend to create a private right of action under Section 503.

C. Implication of a Private Right of Action Under Section 503 Would Conflict With the Administrative Procedure Prescribed by Congress

The third *Cort* v. *Ash* factor to be considered by the Court in testing a statute for implication of a private right of action is whether to do so would be consistent with the underlying legislative scheme. The Second Circuit noted that Congress had provided a rather complete administrative scheme to remedy Section 503 violations—but not Section 504 violations. 662 F. 2d at 126. In addition, the Court observed that the scheme has been implemented by the Department of Labor through a comprehensive set of regulations. 41 C. F. R. §§ 60-741.4 to 60-741.54 (1980). The Department of Labor is thus armed with several means to resolve complaints filed under the directive of Section 503(b) of the Act. Those means include informal methods of conciliation and persuasion, whenever possible, as well as more stringent remedies such as withholding progress payments, terminating existing contracts and prohibiting further contracts with a discriminating employer. The Court concluded from this scheme that:

> "[T]he underlying congressional purpose was to provide an administrative procedure for the determination of complaints under which administering agency was to use its powers to enforce the section in question." 662 F. 2d at 126.

The Court's conclusion on this point seems indisputable. It has often been stated by this Court that:

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[8] Whether implication of a private right of action is an "improvement" is, of course, a policy question to be left to Congress to decide.

> "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.

Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U. S. 11, 19, 100 S. Ct. 242, 247 (1979) cited in, *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, ___ U. S. ___, 101 S. Ct. 2615, 2623 (1981); See also, *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 571-74 (1979); *National Railroad Passenger Corporation (Amtrak)* v. *National Association of Railroad Passengers*, 414 U. S. 453, 458 (1974). Here, where Congress carefully distinguished between Sections 503 and 504 of the Act and prescribed an administrative remedy for Section 503, it is apparent that it did not intend to provide private judicial relief in Section 503 outside the context of the administrative process.

Permitting a private right of action under Section 503 would thus short-circuit the Department of Labor's enforcement effort, cutting short the salutary goals of resolution by conciliation (41 C. F. R. § 60-741.23), and burdening the federal judiciary with actions based on Government contracts without the screening or participation of the Department of Labor Office of Federal Contract Compliance Programs.[9] Such a result would plainly be contrary to the intent of Congress.

Thus, our analysis ends where it began with the determination of Congressional intent from all available sources. United contends that Congress' intention is manifest in the Section 503 language Congress chose, the history of its legislative efforts and the entire statutory scheme it passed. There is simply no reason for this Court to review the compelling judgment of the Second Circuit.

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[9] See generally, Wright, *Equal Treatment of the Handicapped by Federal Contraction*, 26 Emory L. J. 67 (1977).

II. PETITIONER'S COMPLAINT THAT THE PROCESS PRESCRIBED BY CONGRESS IS INADEQUATE SHOULD NOT BE HEARD BY THIS COURT

Section 503(b) of the Act directs the Department of Labor to investigate promptly any complaint filed by a handicapped individual who believes a contractor has failed or refuses to comply with the mandatory provisions of its contract with the Government and to "take such action thereon as the facts and circumstances warrant." A major part of Petitioner's argument to this Court alleges that the administrative process is inadequate thereby depriving Petitioner of any effective remedy for perceived violations of the Act.

First, United disagrees with the assumption that the administrative process is inadequate. While some time has passed since Petitioner filed his complaint, the Office of Federal Contract Compliance Programs is at this time actively conducting a comprehensive investigation into the charges made by Petitioner and will have the full resources of the Government available to it should Petitioner's complaint be found to have merit. His charge of an inadequate remedy is clearly premature since it is unclear what remedy, if any, will be prescribed as a result of the administrative process.

Second, the Second Circuit has already considered Petitioner's argument that the agency backlog demonstrates the need for private rights of action and rejected it:

> "While lack of executive resources to enforce an act of Congress is regrettable, it is hardly the judiciary's role to redress that lack by inferring a judicial remedy." 662 F. 2d at 126-127, citing *Piper* v. *Chris-Craft Industries,* 430 U. S. 1, 41 (1977).

Finally, Petitioner's assertion that the administrative process prescribed by Congress is insufficient to meet his requirements has been addressed to the wrong forum. What he seeks

by this argument is an amendment to the statute, not an implication that Congress really intended something different than what it actually enacted. His policy argument as to which is the best way to enforce the contract provision mandated by Section 503 has already been considered by Congress in 1973 when it wrote the Act and, presumably, in 1974 and 1978, when it amended it. That Congress refused to expand the avenues of enforcement is not for the Supreme Court to second-guess in this litigation.

Petitioner's allegation of inadequacy of remedy does not support his Petition and should not, in any event, be heard by this Court.

CONCLUSION

Five United States Courts of Appeals have considered the issue raised by the Petition. All five Circuits have rejected Petitioner's position. For this and for all the reasons set forth in this brief, Respondent, United Air Lines, Inc., opposes the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit and urges that it be denied.

Respectfully submitted,

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